No. 01-7662 (5)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THIS IS A DEATH PENALTY CASE.
MR. MILLER-EL IS SCHEDULED TO BE EXECUTED ON FEBRUARY 21, 2002.

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I. The Questions Presented Merit this Court's Consideration.

In a recent *en banc* decision, the Third Circuit recognized that proper analysis at the third stage of the inquiry under *Batson v. Kentucky*, 476 U.S. 79 (1986), requires consideration of *all* of the evidence, including evidence of a pattern or practice of racial discrimination. *Riley v. Taylor*, No. 98-9009, 2001 WL 1661489 (3d Cir. Dec. 28, 2001) (en banc). As highlighted by *Riley*, unquestioning deference to a trial court's determination remains a formidable obstacle to *Batson* relief, even when, as in Mr. Miller-El's case, there is unrefuted evidence of discrimination. The State in *Riley* attempted to negate strong pattern and practice evidence by elevating the importance of the individual prosecutor's credibility, and thus to effectively insulate the trial court's finding of non-discrimination from habeas review. *See id.* at *15 (the State "seems to argue that since the findings are primarily based on credibility determinations, the mere fact that [the prosecutor] testified is sufficiently probative to support [the state court findings]"). The Court resoundingly rejected this argument, emphasizing that the state courts are required to engage in the three-step *Batson* inquiry and to "*examine all of the evidence* to determine whether the State's proffered race-neutral reasons were pretextual." *Id.* at *16 (emphasis added).

Mr. Miller-El presented insurmountable and largely uncontested evidence of the Dallas County District Attorney's Office's pattern and practice of using peremptory challenges to exclude African-Americans. The District Attorney's Office promulgated a manual advising its staff to strike minority jurors, and statistical evidence shows this advice was heeded at the time of Petitioner's trial. During Petitioner's capital trial, the prosecutors used peremptory strikes to remove 90.9% of qualified African American jurors, which was consistent with the statistical evidence presented at trial that showed the Dallas County District Attorney's Office struck qualified African-Americans from capital juries at a rate of 90.3% in cases tried between 1980 and December of 1986. The prosecution shuffled Mr. Miller-El's jury panels to manipulate the

process to ensure that fewer black jurors would remain on the panel long enough to be interviewed for jury service. The jury cards filled out by prospective jurors in Mr. Miller-El's trial did not provide a blank for the jurors' races, yet the prosecutors race-coded the juror cards. Courts determined that the same prosecutors who tried Mr. Miller-El engaged in discriminatory jury selection practices in cases tried immediately before and after Mr. Miller-El's. Pet. at 7-18.[1]

The pattern and practice evidence was deemed irrelevant by the state courts, and confined to the first step of the *Batson* inquiry by the federal district court. The Fifth Circuit omitted any reference to Mr. Miller-El's pattern and practice evidence, and instead summarily deferred to the state courts' decisions. Such an analysis cannot be squared with *Riley*, or the decisions of several other circuits, *see* Pet. at 21 n.13, which require plenary consideration of all relevant evidence at the third stage of the *Baston* inquiry. The Fifth Circuit compounded its error by erroneously imposing a level of deference that far exceeds that which is called for by the AEDPA.

As Respondent's brief points out, a trial court must be able to assess the prosecutor's credibility, and such assessment may be based upon the prosecutor's "facial expressions, gestures, vocal inflection, and attitude," Opp. at 18, all of which an appellate court does not have the opportunity to observe. However, it does not follow that the trial court's evaluation of the proffered race-neutral reasons is unassailable *when such evaluation is flatly contradicted by undisputed record evidence*.[2] Contrary to Respondent's suggestion, requiring courts to consider all of the relevant evidence will not "detract[] from the ability of the trial court to make its own independent credibility determination," Opp. at 18, but rather will enhance the trial court's ability

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[1] Mr. Miller-El will cite his Petition for Writ of *Certiorari* as "Pet. at __," and appendices to his petition as "Pet. at App. __, p. __." Petitioner will cite Respondent's Brief in Opposition as "Opp. at __," and the appendices to Respondent's Opposition as "Opp. at App. __, p. __."

[2] *See Riley*, at *15-16 ("Certainly it is not required that a federal court should defer to a state court's findings of fact on habeas review as long as the state court accepted the prosecutor's race-neutral explanation, no matter how incredible, contradicted, and implausible it may be.")

to assess the genuineness of counsel's proffered reasons for a peremptory strike. "'[T]he question facing triers of fact in discrimination cases is both sensitive and difficult,'"[3] and this is no less true in the context of a trial judge faced with deciding whether a prosecutor – who may appear before that judge on an almost daily basis – engaged in discrimination. When trial courts are required to conduct decontextualized reviews of the prosecutor's proffered reasons, they are forced to decide whether the prosecutor is telling the truth or lying, as there is no other basis for the decision. Consideration of broader evidence, such as a pattern of discrimination or comparative analysis, liberates the courts by allowing a less *ad personam*, and more practical, basis for policing the system.

Petitioner's case also merits consideration because the lower court's incorrect application of 28 U.S.C. § 2254(d)(2) and § 2254(e)(1) resulted in an extraordinarily deferential standard of review, and the decisions of the lower federal courts reflect widespread disparities in the application of these provisions that can only be remedied by this Court's intervention.

II. *Batson* and its Progeny Require Consideration of All of the Evidence at the Third Stage.

A. The state courts failed to consider the totality of the evidence when determining whether the State engaged in intentional racial discrimination.

Respondent asserts that "[i]t is evident from the transcript [of the *Batson* hearing] that the trial court conscientiously applied each step of *Batson* and considered all of the evidence presented in making its ultimate determination." Opp. at 11 n.4. Thus, Respondent concludes, the trial court followed this Court's jurisprudence "to the letter." Opp. at 11. It is clear from the transcript of the *Batson* remand hearing and the trial court's findings, however, that the court consciously excluded from its consideration all of the pattern and practice evidence when deciding

[3] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000) (quoting *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)).

whether the prosecutors engaged in intentional discrimination, and thus failed to properly engage in the third step of the *Batson* inquiry.[4]

At the outset of the *Batson* remand hearing, the defense offered all of the evidence produced during the pre-trial *Swain* hearing. Opp. at App. A, p. 6-7. The State objected to Petitioner's offer of proof as irrelevant because it "all went to establishing past racially-based exclusion of minorities in Dallas County." The State elaborated:

> It would be our position, *even if every one of [the witnesses at the Swain hearing] had testified that no black had ever served in Dallas County in the past, that testimony, however historically and [sic] accurate it might be, would be irrelevant to the Court's inquiry of [sic] the instant case* . . . . It is not my position, necessarily, that one can no longer make out a Sixth Amendment claim by showing that kind of historical record, but it is my contention that type of historical record has no bearing on a Batson hearing and this case was remanded to this court exclusively for a Batson hearing. *At this time there is absolutely no reason for this Court to consider what may have happened in any case tried in the past in Dallas County or, for that matter, any case tried in the future after this case was tried. All those things are irrelevant and even if they could show no black ever served before or since*, in order to get a Batson remedy, they're going to have to show that in this case we struck jurors based on racial motives. If they can't do that, they will lose this hearing.

Opp. at App. A, pp. 8-10 (emphasis added). In response, defense counsel noted that *Batson* "clearly says that the defendant may rely upon any other relevant circumstances which raises [sic] an inference that the prosecutor used the selection practice to exclude veniremen from the jury on account of their race." Opp. at App. A, p. 10. "[I]n an abundance of caution," the trial court overruled the State's objection, and admitted the evidence from the pre-trial hearing. Opp. at App. A, p. 11. However, the trial court explicitly stated that it might not give the evidence any

[4] Respondent's suggestion that the trial court conscientiously applied each step of *Batson* is also contradicted by Respondent's admission that Petitioner presented a *prima facie* case of discrimination pursuant to *Batson*. Opp. at 10. The Texas Court of Criminal Appeals ("CCA") remanded Petitioner's case after holding Petitioner had established a *prima facie* case. Despite the overwhelming pattern and practice evidence, and without reference to the higher court's conclusion to the contrary, the trial court found that Petitioner had failed to establish a *prima facie* case. App. 1 at 4. The CCA subsequently reaffirmed that Petitioner had made out a *prima facie* case under *Batson*. *See* Pet. at App. 2, p. 1.

weight. *Id.* ("What weight, *if any*, I give [the evidence from the *Swain* hearing] I certainly reserve for myself . . . . Again, in an abundance of caution, I will admit the [*Swain* hearing] evidence. *Whether or not I will give it any weight is another question.*") (emphasis added).

The *Batson* remand hearing took place in one day. Opp. at App. A. At the end of the hearing, both sides presented argument and the trial court announced that it was going to "agree with [the State's] position" and asked the State to prepare proposed findings of fact. Opp. at App. A, p. 49. Whether the trial court simply signed the State's proposed findings without altering them, as it did during state post-conviction proceedings, *see* Pet. at App. 9, is not clear from the record. However, the findings mirror exactly the State's closing argument during the hearing, *see* Opp. at App. A, pp. 45-49, and there is no reference to any of the *Swain* evidence in the trial court's findings. *See* App. 1.

The findings specifically catalogued the evidence the court considered, stating "the court has considered the entire voir dire process, including the undisputed facts [regarding the race of the defendant, the racial composition of the jury, and the number of strikes the State used against African-Americans], and the explanations for the exercise of the State's peremptory challenges offered at trial and at the retrospective Batson hearing." App. 1 at 5. Because the trial court declined to consider or give any weight to the evidence adduced during the *Swain* hearing, its findings regarding the reasonableness of the State's explanations for its strikes omit any reference to the overwhelming evidence of Dallas County's pattern and practice of excluding African-Americans from juries. On appeal, the Court of Criminal Appeals summarily affirmed the trial court's findings, also without reference to the overwhelming pattern and practice evidence. Pet. at App. 2, p. 2.

Contrary to Respondent's suggestion, the record of the state court proceedings plainly demonstrates that the trial court adopted the State's position and consciously declined to consider

Dallas County's pattern and practice of using peremptory strikes to exclude African-Americans.

B. Respondent's argument that courts applying *Batson* need not address probative evidence of a prosecutor's discriminatory intent is based on a gross misreading of lower court precedent.

In *Riley*, an analytically indistinguishable case, the *en banc* Third Circuit Court of Appeals concluded that courts must consider the totality of the evidence, including pattern and practice evidence, when applying the third step in the *Batson* inquiry. *Riley*, 2001 WL 1661489 at *17. Respondent, in her Opposition, quotes extensively from the *Riley* case, *see* Opp. at 14-16, and incorrectly attributes the quotations to Chief Judge Becker's concurrence. *Id.* In fact, the quotations in Respondent's Opposition are taken from Judge Alito's dissenting opinion. *Compare id. with Riley*, 2001 WL 1661489 at *49-50 (Alito, J., dissenting). Thus, the excerpted portions of the *Riley* opinion contained in Respondent's opposition do not reflect the law in the Third Circuit.

In *Riley*, the prosecution used peremptory challenges to strike all three prospective African-American jurors. *Id.* at *4. During a post-conviction hearing, the prosecution offered facially race-neutral reasons for the strikes. *Id.* at *6. Riley presented evidence that the same prosecutor's office used "its peremptory challenges to remove every prospective black juror in the three other first degree murder trials that occurred within a year of his trial." *Id.* at *7. As in Mr. Miller-El's case, the State in *Riley* made no effort to rebut Riley's pattern and practice evidence. The hearing judge subsequently accepted the prosecution's race-neutral reasons without reference to the pattern and practice evidence, and the Delaware Supreme Court affirmed the trial court, again omitting reference to Riley's additional evidence. *Id.*

The Third Circuit held that "when we review the record at step three of the *Batson* inquiry, we must decide whether the state courts' acceptance of the State's explanation has been made after consideration of all the evidence on the record." *Id.* at *9. Because the state court did

not address Riley's pattern and practice evidence, the Third Circuit held that the "hearing judge's opinion [did] not satisfy the crucial third step of the *Batson* analysis." *Id.* at *11. Turning to the question of the level of deference due to the state court findings, the Third Circuit stated:

> Deference in a *Batson* case must be viewed in the context of the requirement that the state courts engage in the three-step *Batson* inquiry. As the Court of Appeals for the Fourth Circuit described step three: "If [the State's] burden [under step two] is met, the court then addresses and evaluates all evidence introduced by each side (including all evidence introduced in the first and second steps) that tends to show that race was or was not the real reason and determines whether the defendant has met his burden of persuasion."
>
> Here, the state courts failed to examine all of the evidence to determine whether the State's proffered race-neutral explanations were pretextual. Not only is there no indication on the record that the hearing judge engaged in the required analysis, but there is no indication that the Delaware Supreme Court did so . . . .

Id. at *16 (quoting *United States v. McMillon*, 14 F.3d 948, 953 n. 4 (4th Cir.1994)) (citations omitted). The court emphasized that its concern with the absence of any reference to Riley's evidence of systematic exclusion was not merely a formalistic matter regarding the state court opinions: "Although a judge considering a *Batson* challenge is not required to comment explicitly on every piece of evidence in the record, some engagement with the evidence considered is necessary as part of step three of the *Batson* inquiry." *Id.* at *19. "[T]he requirement that the state courts faced with a *Batson* challenge engage in the critical step three analysis is not a product of our own creativity but an accepted element of a habeas court's obligation to examine whether a defendant's constitutional right to a race-neutral jury has been infringed." *Id.* at *20.

In Petitioner's case, even more than in *Riley*, the record clearly shows that the state courts refused "to engage in the critical step three analysis," and Respondent's attempts to distinguish the instant case from *Riley* are unavailing.[5] Respondent asserts that Miller-El's *prima facie*

[5] Respondent points out that the analysis in *Riley* proceeded under the pre-AEDPA standard of review. Opp. at 14-15. This observation is irrelevant to whether courts applying *Baston* must weigh all of the evidence relevant to racial discrimination at the third step of the inquiry, as the AEDPA did not alter

evidence is weaker than that in *Riley* in that it "does little to detract from the State's peremptory justifications" and merely amounts to "historic data" and "discriminatory innuendo in establishing his *prima facie* claim." Opp. at 15. Respondent's characterization of the breadth and effect of Petitioner's evidence is grossly inaccurate. Riley's rebuttal evidence consisted solely of proof that the prosecution struck all African-Americans in the three other first degree murder cases tried in the same county during the same year. Petitioner presented evidence that Dallas County prosecutors struck 90.3% of qualified African-Americans in the fifteen capital cases tried between 1980 and December of 1986, a period of time that includes not only the year in which Petitioner was tried – 1986 – but the six preceding years. Pet. at 7-8. This evidence alone is far more probative than that adduced by Riley.

Mr. Miller-El also adduced uncontested statistical evidence that Dallas County prosecutors used peremptory challenges to remove 86% of qualified African-American jurors in non-capital felony cases, uncontested evidence that the Dallas County District Attorney's office promulgated a training manual advising prosecutors to strike minorities (and distributed this manual into the 1980s), testimony from lawyers and judges that it was common knowledge that prosecutors in Dallas County used peremptory challenges to exclude minorities, and proof that the same attorneys who prosecuted Petitioner were found to have discriminated in trials immediately preceding and following Petitioner's. Pet. at 7-10. Moreover, in addition to striking death-qualified African-Americans, the prosecution engaged in other racially discriminatory practices during Mr. Miller-El's trial, including "shuffling" the venire in an effort to prevent African-

this Court's Equal Protection jurisprudence. Respondent's attempts to distinguish Petitioner's case from decisions in other circuits holding that courts must consider all relevant evidence at the third stage of the *Baston* inquiry, *see id.* 16 n.6, are similarly unpersuasive. Whether a *Batson* claim is decided on direct appeal or during habeas proceedings, and whether the pre- or post-AEDPA version of 28 U.S.C. § 2254 applies, the required three-step analysis remains the same. Even after the AEDPA, federal courts retain the authority in habeas corpus proceedings to enforce this Court's Equal Protection jurisprudence. *See, e.g., McClain v. Prunty*, 217 F.3d 1209 (9th Cir. 2000).

Americans from serving and engaging in racially disparate questioning on the issue of a potential juror's ability to assess the minimum punishment. Pet. at 10-18. This evidence is not merely "discriminatory innuendo" which establishes Petitioner's *prima facie* case, Opp. at 15, but rather probative evidence that should have been considered at the third step when assessing the genuineness of the prosecutors' proffered race-neutral reasons. *See* Pet. at 18-21, 24-28.

The state courts plainly refused to engage Mr. Miller-El's evidence of Dallas County's pattern and practice of systematically excluding African-Americans from juries, and the lower federal courts confined the relevance of this evidence to the issue of whether Mr. Miller-El had made out a *prima facie* case. The refusal of the state courts, and the courts below, to consider all of the relevant evidence during the third stage of the *Baston* inquiry was unreasonable in light of this Court's established Equal Protection jurisprudence.

C. Petitioner does not seek the application of a new rule, but merely seeks enforcement of this Court's precedent.

Respondent asserts that Petitioner seeks a new rule imposing shifting levels of scrutiny at the third stage of the *Batson* inquiry. Opp. at 13, 17-19. This is a misstatement of Petitioner's argument. Petitioner is not advocating for the creation of a novel scheme in which differing tests are applied at the third step of the *Batson* inquiry, but simply seeks a straightforward application of *Batson*, in which the courts actually engage in the third step and weigh all of the evidence when deciding whether he has met his burden of demonstrating intentional racial discrimination.

As Respondent notes, this Court has observed that "[i]n the *typical* peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercised the challenge." *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (emphasis added); *see* Opp. at 18. However, this is not a typical case because there is voluminous pattern and practice evidence relevant to

whether the prosecutor's race-neutral explanation should be believed. Respondent's suggestion that consideration of pattern and practice evidence would "improperly penalize[] those defendants who do not have the advantage of historic discrimination to pad their *prima facie* claim," Opp. at 17, is simply unsupportable.

This Court has unambiguously held that courts applying *Batson* must consider the totality of the circumstances at the third step when deciding whether the race-neutral reason should be believed, and that significant pattern and practice evidence is probative of racial discrimination. *See Hernandez*, 500 U.S. at 369 (pattern and practice evidence may render "a finding of no discrimination . . . simply too incredible to be accepted"); *id.* at 374 (O'Connor, J., concurring) ("Disproportionate effect may, of course, constitute evidence of intentional discrimination. The trial court may, because of such effect, disbelieve the prosecutor and find that the asserted justification is merely a pretext for intentional race-based discrimination.").

To date, no court reviewing Mr. Miller-El's case has considered all of the relevant evidence at *Batson*'s third stage. The overwhelming evidence of a pattern and practice of racial discrimination in Dallas County demonstrates that the fact that the prosecutors excluded 90% of the qualified African-American jurors from Petitioner's trial is more plausibly explained by the Dallas County policy of removing minority jurors and the prosecutors' documented, contemporaneous jury selection practices than it is by their proffered race-neutral reasons. When purported race-neutral reasons are proffered in the context of such strong, undisputed evidence of a pattern and practice of discriminatory behavior, courts engaging in the third step of the *Batson* inquiry should necessarily greet the proffered reasons with greater skepticism than would be warranted in cases in which no such evidence is presented.

Finally, the assertion that Petitioner seeks a new rule is contradicted by the numerous decisions of lower courts that have been compelled by this Court's Equal Protection jurisprudence

to conduct a meaningful assessment of all of the evidence relevant to discriminatory intent at the third stage of the *Batson* inquiry. *See* Pet. at 20-21 & n.13.

III. 28 U.S.C. § 2254(d) Does Not Impose a Bar to Granting Relief to Petitioner.

A. 28 U.S.C. § 2254(d) authorizes relief on Petitioner's *Batson* claim.

Respondent argues that relief is barred in this case because the post-AEDPA standard of review applies to Petitioner's *Batson* claim. Opp. at 14-15, 16 n.6, 19-20. As Mr. Miller-El argued in the courts below, neither § 2254(d)(1) nor § 2254(d)(2) bar relief in this case.

1. The state court decision was an unreasonable application of this Court's *Baston* jurisprudence.

A state court decision is unreasonable under § 2254(d)(1) if the court ignored or discounted evidence plainly relevant to its determination. *See (Terry) Williams v. Taylor*, 529 U.S. 362, 416 (2000) (O'Connor, J., joined by Kennedy, J., concurring). In *Williams*, Justice O'Connor noted that the Virginia Supreme Court's dismissive treatment of what was in reality a very powerful claim "reveal[ed] an obvious failure to consider the *totality* of the omitted mitigation evidence," and that this "obvious failure" to genuinely assess the evidence rendered the Court's application of the law to the facts "unreasonable." *Id.* In the instant case, the CCA's decision on the merits of the *Batson* claim – which is relegated mostly to an appendix attached to its unpublished opinion – reveals precisely the same flaw. The *Batson* inquiry, like the *Strickland* inquiry, calls for a consideration of the "totality" of the evidence tending to prove discrimination. Such consideration is glaringly absent from the CCA's opinion. Like the federal magistrate judge, the CCA focused solely on whether the prosecution had been able to advance facially race-neutral reasons for its strikes, and prematurely ended its inquiry there. Nowhere did the CCA engage the overwhelming additional pattern and practice evidence bearing on the prosecutors' intent. *See supra* at 8-9. The state court's failure to consider the "totality of the evidence" was clearly an unreasonable application of this Court's established Equal Protection jurisprudence.

2. The state court resolution of the *Batson* claim was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The refusal of the state courts to consider Dallas County's pattern and practice of using peremptory challenges to exclude African-Americans was also, under § 2254(d)(2), an unreasonable determination of the facts in light of the evidence presented to the state courts. As Respondent notes, both of Petitioner's claims before this Court involved outcome-determinative findings of fact. Opp. at 8. Resolution of Petitioner's *Batson* claim turns ~~on the fact~~ finding made at the third step of the *Batson* inquiry. Given the abundant pattern and practice presented by Mr. Miller-El, and the established Equal Protection jurisprudence dictating that such evidence is relevant to *Batson*'s third stage, the state court surely was required to actually consider Mr. Miller-El's evidence in order to render a reasonable "determination of the facts *in light of the evidence presented in the State court proceeding*." *See* 28 U.S.C. § 2254(d)(2) (emphasis added). Here, the state court record and opinions reflect that the courts adopted the prosecution's position that pattern and practice evidence is simply irrelevant to the *Batson* inquiry.[5] *See supra* at 4-5. The state court's finding that the prosecutors did not engage in racial discrimination during Petitioner's trial was made only after turning a blind eye to overwhelming evidence to the contrary, which was plainly unreasonable.

B. 28 U.S.C. § 2254(d) authorizes relief on Petitioner's competency claim.

Respondent, without ever alluding to the *ex parte* manner in which the trial court accepted and adopted *in toto* the prosecutor's proposed findings of fact, asserts that the state court

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[5] The State took the extreme position that even if pattern and practice evidence demonstrated that the Dallas County District Attorney's Office had excluded African-Americans from serving on all Dallas County juries in the past, this information would be irrelevant to the *Batson* inquiry. Opp. at App. A, p. 8-9; *see supra* at 4.

determination of Mr. Miller-El's competency-to-stand-trial claims[6] was reasonable. Opp. at 22-26. The State court, however, resolved Mr. Miller-El's claims by ignoring the evidence proffered by Mr. Miller-El, as well as the serious deficiencies in the affidavit submitted by the State's purported expert.

Petitioner's argument is not predicated solely on the fact that the trial court's findings fail to mention Petitioner's evidence in support of his claims. *See* Opp. at 22. The flaw in the state court findings is not one of mere omission. Rather, the findings, which were prepared by the prosecution, affirmatively stated that Mr. Miller-El presented the state courts "nothing to show that any evidence presently exists of applicant's alleged incompetency."[7] Pet. at App. 3, p. 7. This language confirms that the absence of any reference in the findings to Petitioner's evidence reflects not just a failure to mention all of the evidence, but a failure to *consider* all of the relevant evidence. In fact, Petitioner presented the affidavit of a medical expert – supported by voluminous medical records – who concluded that Mr. Miller-El was incompetent to stand trial. *See* Pet. at 38-39.

The state courts' failure to consider all of the evidence presented by Petitioner "resulted in a decision that was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

IV. Respondent's Suggested Reading of 28 U.S.C. § 2254(d)(2) and § 2254(e)(1) Conflicts with the Fifth Circuit's Decision in this Case – and Others – as Well as the Decisions of Other Circuits.

Although Respondent purports to defend the Fifth Circuit's application of § 2254(d)(2)

[6] Mr. Miller-El sought relief based on his incompetence to stand trial and the trial court's failure to conduct a hearing *sua sponte* regarding Mr. Miller-El's competency to stand trial.

[7] Similarly, although the trial court made three separate requests during the trial that Petitioner be evaluated by a doctor, the last of which was specifically for ascertaining Mr. Miller-El's fitness to attend court, the prosecution's findings stated that there was no *bona fide* doubt as to Petitioner's competence to stand trial. Pet. at 39.

and § 2254(e)(1) to Petitioner's case, Opp. at 26, Respondent suggests an analysis different from the court's and wholly fails to discuss or defend the standard applied to Petitioner's case by the court of appeals. Opp. at 26-30.

Instead of suggesting, as the lower court did, that habeas petitioners be required to show that state court fact findings are unreasonable, and prove the unreasonableness by clear and convincing evidence, Respondent suggests that courts should first apply the § 2554(e)(1) presumption of correctness, and only if a petitioner can overcome the presumption of correctness should courts then address the § 2254(d)(2) inquiry. Opp. at 27-30. In a case such as this, which both parties agree turns on outcome-determinative fact findings, this approach makes no sense. When a petitioner demonstrates by clear and convincing evidence that the prosecution engaged in intentional racial discrimination, he or she should be entitled to relief. *See e.g. Gardner v. Johnson*, 247 F.3d 551, 559 n.31 (5th Cir. 2001) (analogizing "unreasonableness" to a "clear error" standard).

Nor is Respondent's argument supported by her citation to *Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001). *See* Opp. at 30. In *Valdez*, the majority harmonized § 2254(d)(2) and § 2254(e)(1) as follows:

> Whereas § 2254(d)(2) sets out a general standard by which the district court evaluates a state court's specific findings of fact, § 2254(e)(1) states what an applicant will have to show for the district court to reject a state court's determination of factual issues. For example, a district court may find by clear and convincing evidence that the state court erred with respect to a particular finding of fact, thus rebutting the presumption of correctness with respect to that fact. *See* § 2254(e)(1). It is then a separate question whether the state court's determination of facts was unreasonable in light of the evidence presented in the state court proceeding. *See* § 2254(d)(2). Thus, it is possible that, while the state court erred with respect to one factual finding under § 2254(e)(1), its determination of facts resulting in its decision in the case was reasonable under § 2254(d)(2).

Id. at 951 n.17. As is clear from the above excerpt, the *Valdez* majority held that § 2254(d)(2)

requires a separate inquiry, but did not hold that satisfying the § 2254(e)(1) inquiry was a prerequisite to relief under § 2254(d)(2). Pursuant to *Valdez*, it is equally possible that a state court was correct in its determination of a specific fact under § 2254(e)(1), but that the determination of the facts *resulting in its decision* was unreasonable in light of the evidence presented to the state court, warranting relief under § 2254(d)(2).

Respondent cannot point to a clear line of authority in the Fifth Circuit which dictates how to apply the two provisions, because panels of the Fifth Circuit are in disarray over the issue. *See* Pet. at 35-36. Even if Respondent's analysis was the clearly preferred approach of the Fifth Circuit, and the court had actually applied the analysis in this case, this approach – in addition to leading to the anomalous result that a petitioner is not entitled to relief despite demonstrating an Equal Protection violation by clear and convincing evidence – conflicts with that of the Ninth Circuit. *See Torres v. Prunty*, 223 F.3d 1103, 1110 n.6 (9th Cir. 2000) (satisfying § 2254(d)(2) negates the § 2254(e)(1) presumption of correctness).

CONCLUSION

Respondent asserts that Petitioner raises the confusion regarding the application of § 2254 in an attempt to prevent his execution. Opp. at 30. Even after the enactment of the AEDPA, petitioners are entitled to "meaningful federal court review of the evidentiary record considered by the state courts."[8] At issue here is whether Petitioner is entitled to meaningful review of the overwhelming evidence of intentional racial discrimination that the state courts refused to consider. For the reasons set forth above, Petitioner THOMAS JOE MILLER-EL respectfully prays that this Court grant his petition for a writ of *certiorari*.

Respectfully Submitted,

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[8] *Beck v. Bowersox*, 257 F.3d 900, 901 (8th Cir. 2001) (discussing § 2254(d)(2) and § 2254(e)(1)).

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

CERTIFICATE OF SERVICE

I, Jim Marcus, hereby certify that true and correct copies of Petitioner-Appellant's Reply to Respondent's Brief in Opposition, and Petitioner-Appellant's Appendix to the Reply to Respondent's Brief in Opposition, were served on counsel for Respondent-Appellee on this 23rd day of January 2002, via First Class United States Mail, addressed to:

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Office of the Attorney General
Capital Litigation Division
Price Daniel, Sr. Building, 7th Floor
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Austin, Texas 78701

Jim Marcus
Counsel of Record

NO. 8668-NL

THE STATE OF TEXAS	§	IN THE CRIMINAL
VS.	§	DISTRICT COURT NO. 5
THOMAS JOE MILLER-EL	§	DALLAS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW
UPON REMAND FROM THE COURT OF CRIMINAL APPEALS

I.

PROCEDURAL HISTORY LEADING TO REMAND

Thomas Joe Miller-El, hereinafter referred to as "Defendant," was charged by indictment with capital murder. Following jury voir dire conducted in February and March of 1986, the Defendant was found guilty of capital murder and sentenced to death. The Defendant appealed his conviction to the Court of Criminal Appeals, raising inter alia, a claim that the prosecutors who selected the jury in the instant case violated the principles enunciated in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1722, 90 L.Ed.2d 69 (1986).

On March 3, 1988, the Court of Criminal Appeals returned an opinion which abated the appeal to this court with instructions to "conduct further proceedings not inconsistent with this opinion and Batson" and to forward the record of those proceedings and Findings of Fact and Conclusions of Law to the Court of Criminal Appeals. Opinion of March 3, 1988, 748 S.W.2d 459,461.

The State filed a motion for rehearing which was denied by the Court of Criminal Appeals on April 27, 1988. In the interim, the Court of Criminal Appeals had decided Keeton v. State, 749 S.W.2d 861 (Tex. Crim. App. 1988) (opinion following abatement).

Accordingly, in its opinion of April 27, 1988, denying the State's motion for rehearing, the Court of Criminal Appeals stated:

> This appeal is abated to the trial court with instructions that it conduct a hearing pursuant to the full procedure and steps outlined in Keeton v. State . . .
> Order of 4/27/88.

Because the State's Motion for Rehearing sought to clarify the issue of whether this court could determine whether a prima facie case of purposeful discrimination had been established by the Defendant, this Court deems the use of the phrase "full procedure and steps outlined in Keeton" in the order of April 27, 1988 to have added significance[1] and has interpreted the use of this phrase to mean that this Court is to perform all the prongs of the analysis set out in Keeton.

II.

THE RETROSPECTIVE BATSON HEARING

On May 10, 1988, this court conducted a hearing on the Batson issues. At that time, the court noted that certain facts were not in dispute or could be stipulated by the parties. S.F. 4-15.[2]

---

[1]It may be that the Court of Criminal Appeals' original opinion ordering a remand to this court also authorized this court to make the prima facie case determination:

> However, it is not for this Court to say whether there was any racial motivation in the prosecutor's actions. Batson requires such a determination being made by the trial court.
> Miller-El, supra, at 460 .

[2]The court reporter's transcription of this hearing has been typed. It is referred to throughout this set of Findings as: S.F. ___.

This Court withheld its rulings on the prima facie showing issue and, without objection from either party, asked the State to produce its reasons for striking the ten black veniremen. S.F. 15-16.

The State then called Mr. Paul Macaluso, an assistant United States attorney, who, at the time of trial, was the Dallas County Assistant District Attorney in charge of the State's voir dire in the instant case. S.F. 17-18;20-21.

Mr. Macaluso then testified concerning the reasons that the State had exercised peremptory challenges against venireman, No. 102, Paul Bailey. S.F. 21-26. Basically, he testified that he exercised peremptory challenge against Bailey due to the opposition to the death penalty which Bailey had expressed in jury questionnaires and during voir dire. He also testified that race played no part in his decision to strike Bailey.

Mr. Macaluso also testified concerning the State's reasons for striking Venireman Joe Warren. S.F. 26-33. In sum, these reasons included the fact that Warren's brother was a convicted felon, that Warren had given what the State regarded to be inconsistent responses to questions during voir dire regarding the death penalty, and certain answers concerning an incident involving Warren's son. All of these factors led the prosecutors to conclude that Warren would not be a juror favorable to the State. Race played no part in deciding to strike Warren.

The court indicated that it would consider the reasons provided by the State at trial for striking of the other eight black veniremen. S.F. 16;34;44-45.

III.

UNDISPUTED FACTS AND LEGAL ISSUES

The following facts, which are relevant to the Batson issues before this court, are not disputed:

1) The Defendant is black, and, therefore, he is a member of a "cognizable racial group" for purposes of Batson.

2) That jury voir dire occurred in February and March of 1986, well before the return of the Supreme Court's opinion in Batson.

3) That during the course of the individual voir dire process, the State exercised 14 of its 15 peremptory challenges.

4) That the State exercised 10 of these 14 peremptory challenges against veniremen of the Defendant's race.

5) That six other black veniremen were excused by the agreement of the parties.

6) That the jury selected and impaneled had nine white jurors, one Hispanic juror, one black juror, and one Filipino juror.

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DISPUTED ISSUES

A. Prima Facie Case

At the time of the trial in this case, this court was convinced that none of the State's peremptory challenges were made for race-related reasons. The court remains convinced that this is true, and holds that the evidence did not even raise an inference of racial motivation in the use of the State's peremptory challenges. While it is true that the State used 10 of its 14 peremptory challenges against black veniremen, it is also true

that one black venireman did serve on the jury. However, such raw numbers, while instructive, are not the sole basis for this court's holding; rather, the court has considered the entire voir dire process, including the undisputed facts set forth in Part III, supra, and the explanations for the exercise of the State's peremptory challenges offered at trial and at the retrospective Batson hearing. In this regard, this Court has considered the procedure outlined by the Supreme Court of Missouri in State v. Antwine, 743 S.W.2d 51 (Mo. banc 1987), an opinion quoted extensively by the Court of Criminal Appeals in its opinion in Keeton v. State, supra. See, 749 S.W.2d at 865-66. In Antwine, the Court stated:

> As a practical matter, the third element of the prima facie case under Batson -- "facts and any other relevant circumstances raise an inference that the prosecutor used [his peremptory challenges] to exclude the veniremen from the petit jury on account of their race" -- requires the trial court to consider the State's explanation of the manner in which it employed its challenges prior to making a final determination as to whether a prima facie case exists. We must therefore direct our trial judges to consider the prosecutor's explanations as part of the process of determining whether a defendant has established a prima facie case of racially discriminatory use of peremptory challenges.

Antwine, 743 S.W.2d at 64.

B. Reasonableness of the State's Explanations

Because this court does not wish to unduly delay the progress of the appeal of this case, it required the State to produce explanations for the exercise of all of her peremptory challenges, notwithstanding the court's belief in the correctness of its ruling on the prima facie showing issue.

The Court has considered the reasons given at trial and those offered at the hearing on remand. As to the ten black veniremen in question, the Court makes the following Findings of Fact and Conclusions of Law:

1. The Court finds that the prosecutor came forward with a neutral explanation for each of the State's peremptory challenges of a venireman of the Defendant's race.

2. The Court finds that the explanations given by the prosecutor in each case were completely credible.

3. The Court finds that explanations given by the prosecutor as to each venireman were completely sufficient as to content.

4. The Court finds that none of the explanations given by the prosecutor were based on a group trait which was not shown to apply to the challenged veniremen specifically.

5. The Court finds that none of the veniremen in question were examined only perfunctorily by the prosecutors.

6. The Court finds that no disparate prosecutorial examination of any of the veniremen in question has been shown.

7. The Court finds that the primary reasons for the exercise of the challenges against each of the veniremen in question, their

reluctance to assess or reservations concerning the imposition of the death penalty, were closely and directly related to the facts of the case, insofar as this was a death penalty case.

8. The Court finds the other factors cited by the prosecutors were reasonably related to the facts of the case.

9. The Court finds that there has been no showing by the Defendant of disparate treatment by the prosecutor of the black veniremen in question versus non-black veniremen, where there was a difference between the responses given by veniremen who were and who were not challenged by the State.

10. The Court finds that there was no purposeful discrimination by the prosecutor in the use of his peremptory strikes.

SIGNED THIS 13 day of January 1988.

PAT McDOWELL, Judge
Criminal District Court No. 5
Dallas County, Texas

No. 01-7662

In The
Supreme Court of The United States

THOMAS JOE MILLER-EL,
Petitioner,

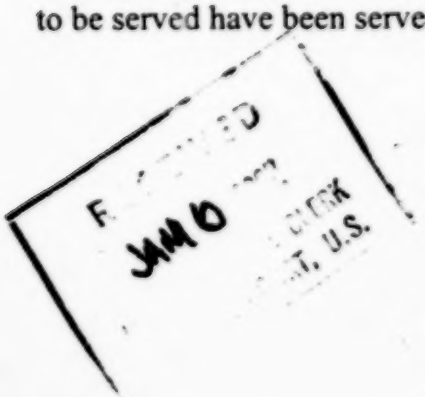
v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit
and on Application for Stay of Execution

PROOF OF SERVICE

I hereby certify that on the 11th day of January, 2002, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Jim Marcus and Elizabeth Detweiler, TEXAS DEFENDER SERVICE, 412 Main Street, Suite 1150, Houston, Texas 77002. All parties required to be served have been served. I am a member of the Bar of this Court.



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